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4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 PHILLIP PLATA,)

8 Petitioner,)

9 v.)

10 THERESA TALPALACIDO, et. al.,)

11 Respondent.)

Case No. C08-1441-JLR-BAT

REPORT AND
RECOMMENDATION

12 Petitioner Phillip Plata has submitted a proposed Petition for Writ of Mandamus under 28
13 U.S.C. § 1361, requesting that the Court direct the Federal Bureau of Prisons (“BOP”) and two of
14 its employees, Theresa Talpalacido and Harlan Penn, to perform their duties regarding a Federal
15 Tort Claim. Dkt. 1. He seeks leave to proceed *in forma pauperis* in this matter. *Id.* Petitioner, a
16 federal prisoner at the United States Penitentiary in Lompoc, California, alleges that on April 6,
17 2008, he mailed to Mr. Penn a Federal Tort Claim regarding “loss of Plaintiff’s property” and that
18 Mr. Penn directed petitioner to address all “future correspondence” to Theresa Talpalacido.
19 Proposed Pet. at 2. Petitioner further alleges that on July 3, 2008, he sent correspondence
20 regarding the Tort Claim to Ms. Talpalacido but has received no response. *Id.* He requests “that a
21 Writ of Mandamus issue making Respondents conform with their ministerial duties regarding
22 Petitioner’s Tort Claim filing.” *Id.* at 3.

23 Mandamus is an extraordinary remedy. *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir.

1 1994). A writ of mandamus is appropriately issued only when (1) the plaintiff's claim is "clear
2 and certain"; (2) the defendant official's duty to act is ministerial, and "so plainly prescribed as to
3 be free from doubt"; and (3) no other adequate remedy is available. *Id.* (citing *Fallini v. Hodel*,
4 783 F.2d 1343, 1345 (9th Cir. 1986)).

5 In this case, petitioner has not presented a claim that is sufficiently clear and certain.
6 Petitioner's mandamus request is based on a Federal Tort Claim he has initiated against the BOP
7 and its employees for loss of property. The Supreme Court has recently held that BOP officers
8 who lose an inmate's property are immune from Federal Tort Claims for mishandling the property.
9 *Ali v. Fed. Bureau of Prisons*, 128 S.Ct. 831 (2008); *see also Bramwell v. U.S. Bureau of Prisons*,
10 348 F.3d 804, 807-08 (9th Cir. 2003) (inmate may not sue BOP officers, or the United States,
11 under the Federal Tort Claims Act for damaging inmate's eyeglasses).

12 Even assuming petitioner has presented a clear and certain claim, he has not shown that no
13 other adequate remedy exists. Petitioner has initiated a Federal Tort Claim which could be
14 followed by a civil action in federal court. Before initiating a civil action for loss of property, a
15 claimant must exhaust his remedies by presenting the claim to the appropriate federal agency and
16 the agency must deny the claim. 28 U.S.C. § 2675(a). "The failure of an agency to make final
17 disposition of a claim within six months after it is filed shall, at the option of the claimant any time
18 thereafter, be deemed a final denial of the claim for purposes of this section." *Id.* Here, petitioner
19 avers that he "mailed a Tort Claim" to the BOP on April 6, 2008 and that the BOP has not
20 responded. Dkt. 1 at 2. Assuming petitioner properly presented his Tort claim on April 6, 2008,
21 the six month period expired on October 5, 2008, and he may therefore initiate a civil action for
22 loss of property. Because this provides petitioner an adequate remedy, a writ of mandamus should
23 not be issued.

1 For the reasons set forth above, the Court recommends that petitioner's Petition for Writ of
2 Mandamus be DENIED and DISMISSED with prejudice. In addition, petitioner's Application for
3 Leave to Proceed *in forma pauperis* should be DENIED as moot. A proposed order accompanies
4 this Report and Recommendation.

5 DATED this 7th day of October, 2008.

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8 BRIAN A. TSUCHIDA
9 United States Magistrate Judge
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